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ABSTRACT

Legal guidelines to help public school administrators make informed choices in situations that may require student searches are provided in this paper. The constitutional basis of the issue is first discussed, noting that school officials are not required to obtain a search warrant or to have probable cause. A review of Supreme Court decisions that demonstrate the two-part test for reasonable search--reasonable suspicion and the scope of search--is presented next. Specific issues that are addressed include searches based on hunches, group searches, informing parties, student consent, locations, police involvement, drug testing, and liability. A conclusion is that the Supreme Court has granted school districts much flexibility in maintaining discipline; however, administrators are cautioned to meet Fourth Amendment guidelines and to ensure fulfillment of the two-part test. Tips for conducting a successful student search are provided. (LMI)

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Legal Guidelines for Permissible Student Searches in the Public Schools

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Legal Guidelines for Permissible Student Searches in the Public Schools

Educators frequently are placed in situations where they must make decisions whether to search a student suspected of possessing some prohibited item. Because constitutionally protected principles are involved, incorrect decisions can result in liability for school employees conducting impermissible searches. The following is presented to assist educators in making informed choices when faced with the necessity of conducting a student search.

Constitutional Basis

In 1969, the U.S. Supreme Court declared that students do not shed their constitutional rights at the schoolhouse gate. One of the constitutionally protected rights enjoyed by all United States citizens is the right guaranteed by the Fourth Amendment to be free from unreasonable search and seizure.

To meet that requirement, educators must be sure that any search they conduct is "reasonable" and that it complies with legal principles mandated by the Constitution, as interpreted by the courts. A school employee who conducts an unreasonable search can be sued by a student in federal court in a civil rights lawsuit. While most student searches do not result in lawsuits, school employees nevertheless should make every effort to comply with all legal requirements to avoid any allegations of wrongdoing.

For many years, the courts issued conflicting opinions regarding what standards governed school searches. However, that confusion ended in 1985, when the U.S. Supreme Court laid down specific guidelines for student searches conducted by school officials. In *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985), the Supreme Court cleared up two major areas of uncertainty.

First, the Court ruled that school officials do not need to obtain a search warrant before searching a student under their authority. While police generally have to obtain a search warrant to conduct criminal searches, the Supreme Court recognized that a somewhat more lenient rule would be appropriate for school authorities.

Second, the Supreme Court concluded that school searches do not necessarily have to be based on probable cause. In order to obtain a search warrant, police must show that the requested search is based on probable cause. In the school setting, the Supreme Court in *New Jersey v. T.L.O.* ruled that the legality of a student search depends "simply on the reasonableness, under all the circumstances, of the search."

The Two-Part Test

In *New Jersey v. T.L.O.*, the U.S. Supreme Court set forth a two-prong test to determine whether a search is reasonable. First, a school official must consider whether the search is "justified at its inception." In essence, this means a teacher or administrator must make a determination whether there are "reasonable grounds for suspecting that the search will turn up evidence that a student has violated or is violating either the law or the rules of the school," according to the Court.

Second, the official must determine how far to extend the scope of the search. In the words of the Supreme Court, "he or she must determine whether the search as actually conducted [is] reasonably related in scope to the circumstances which justified the interference in the first place." In *New Jersey v. T.L.O.*, the Supreme Court has restated the "scope of search" rule as follows:

> [A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

In everyday language, this second part of the test generally is interpreted as making a decision "how far to go" in a student search - whether, for example, to extend the search of a purse to a strip search of the person.

The Supreme Court Demonstrates the Reasonable Cause Standard

These concepts are well demonstrated by the facts in *New Jersey v. T.L.O.* Two New Jersey high school students were smoking a cigarette in a school bathroom, in violation of school regulations, and were caught by a school employee. In the principal's office, one of the students confessed. The other ("T.L.O.") denied that she had been smoking. Faced with the conflict between T.L.O.'s denial against the observation of the employee and the confession of the other student, the assistant vice principal searched the student's purse. Opening the purse, the assistant vice principal discovered a package of cigarettes. On picking up the package of cigarettes, he then saw a package of cigarette rolling papers. Based upon his professional experience, the assistant vice principal associated a student's possession of rolling papers with the use of marijuana. He searched the rest of T.L.O.'s purse and found a small amount of marijuana, some marijuana paraphernalia, empty plastic bags, an index card listing students who owed her money, a substantial quantity of one dollar bills, and two letters implicating T.L.O. in marijuana dealing.

In reviewing the legality of the search, the Supreme Court applied the two part test. First it asked: "Was the action justified in its inception?" The Court concluded that the assistant vice principal's search of the purse for the cigarette package was reasonable. It was based on reasonable grounds to suspect that the search would uncover violations of the school's no-smoking rules. There were numerous factors to give the assistant vice principal a reasonable belief that the student had cigarettes in her purse: she was observed smoking by a school employee, her accomplice had confessed, and she had been implicated by her accomplice in the smoking incident. The assistant vice principal could reasonably believe she was lying and could reasonably believe that the cigarettes were contained in the student's purse.

The Court then inquired as to the second part of the test: "Was the search as actually conducted reasonably related to the circumstances which justified the interference in the first place?" The Court concluded that it was. While the student argued that the assistant vice principal should have closed her purse once he found the cigarettes - and not have searched further - the Court concluded that the assistant vice principal's expansion of the scope of the search was reasonable. The assistant vice principal testified that the rolling papers he discovered when he picked up the cigarette pack gave rise in his mind to a reasonable suspicion that T.L.O. was carrying marijuana as well as cigarettes in her purse. This justified his further exploration of the purse, which produced more evidence of drug-related activities. The court concluded

that upon discovering a small quantity of marijuana and a pipe, it was not unreasonable to extend the scope of the search to the zippered compartments of the purse where the index card containing a list of "people who owe me money" was discovered. Faced with the substantial inference that T.L.O. was involved in marijuana trafficking, the Court further concluded that expanding the scope of the search to reading the letters in her purse was permissible based on the other items found indicating her involvement in prohibited activities.

In summary, the first part of the test is easily understood to involve a judgment call by an educator as to whether he or she has adequate facts adding up to reasonable grounds for suspecting that a search will turn up evidence that a student has violated (or is violating) the law or the rules of the school. The second part of the test requires a second judgment on "how far" to extend the scope of the search. In T.L.O.'s case, the initial "reasonable cause" search was based on expecting to find a package of cigarettes in her purse. On discovering the rolling papers, however, the scope (and seriousness) of the search expanded as new evidence led the administrator to believe that additional contraband items would be discovered in a more intensive search of the purse.

FIRST TEST: What Constitutes Reasonable Suspicion?

A common mistake made by school administrators is conducting searches based on hunches that a student is in possession of some prohibited item. Hunches, guesses, and intuition are not legally supportable grounds upon which to conduct a student search. In better understanding what evidence meets the reasonable suspicion standard, it may be instructive to look at a few court cases examining searches based on hunches. Many of these situations will be familiar to experienced school administrators and teachers.

The Calculator Case Hunch

In one recent California case, an assistant principal noticed a high school student walking across the school's patio after the class bell had already rung. The student was carrying a calculator whose case had an odd-looking bulge. As he approached the assistant principal, the student held the calculator behind his back. On being stopped and questioned as to why he wasn't in class, the student explained that he was a senior and excused in the afternoon because he was on a half-day schedule (which was in fact true). The assistant principal asked him to show him what he had behind his back. The student repeatedly refused, ultimately telling the assistant principal, "You

can't search me," and "You need a warrant for this." The student was taken to the office, and the calculator case was searched. Discovered inside it were four baggies of marijuana.

The California Supreme Court ruled that the search violated the Fourth Amendment. The assistant principal had received no tips and had no prior information to lead him reasonably to believe that the student was in possession of marijuana - or that the student in fact had violated any law. While it was the assistant principal's regular practice to question students who were not in class during regular class periods, the student gave him a reasonable (and true) excuse for not being in class. According to the Court, a student's "furtive gestures" in attempting to hide his calculator could not, standing alone, furnish sufficient cause to search. The Court struck down the search because the assistant principal had "articulated no facts to support a reasonable suspicion that William was engaged in a proscribed activity justifying a search." *In re William G.*, 709 P.2d 1287 (Cal. 1985).

The Case of the Bubblegum Hunch

A second case is illustrative of how a search based on a hunch can backfire. A principal and teacher searched two fifth grade students based on a tip by a school bus driver that she had observed the students "exchanging something" on the school playground. They exchanged what appeared to be money for an object she could not identify. The bus driver suspected that drugs were involved, but there was no other evidence - other than her suspicions - that the unidentified object was contraband. One of the students was "patted down"; the other was forced to remove all his clothing except his underwear. Neither search produced drugs nor evidence of drug use.

In reviewing the search, the U.S. Ninth Circuit Court of Appeals ruled that the school employees did not have reasonable suspicion to believe that the students had drugs in their possession. Other than the bus driver's "hunch," there were no articulable facts that would support the suspicion that the two fifth grade students were exchanging drugs. In fact, they had just been trading bubblegum. *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984).

The Case of the Ducking Co-ed

In another case, a security guard in a school parking lot observed a tenth grade student "ducking" behind a parked car in the parking lot at a time she was supposed to be in school. When asked to identify herself, she gave the security guard a false name. He took her to the office, where she was required to dump the contents of her purse on a desk for inspection by the assistant principal .In her purse were some stolen "readmittance slips." She was then

required to turn her jean pockets inside out and to lean over to permit a female employee to "visually examine the contents of her brassiere".

The only basis for the search was the unsupported hunch of the assistant principal that the student was in possession of illegal drugs. The Court concluded that there was no basis for this belief. In reaching that conclusion, the Court reasoned that while the security guard and the principal might reasonably have suspected that the student had violated some school rule or law, they had no way of knowing whether she was stealing hubcaps, meeting a boyfriend, playing truant, or dealing drugs. In a nutshell, her conduct was "clearly ambiguous." According to the court:

> [The] burden is on the administrator to establish that the student's conduct is such that it creates a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation.

Because the first part of the two-part test was not met, the Court did not even have to determine whether the expanded scope of the brassiere search was reasonably related. The school employees were doubly wrong. *Cales v. Howell Public Schools*, 635 F.Supp. 454 (E.D. Mich. 1985).

The Guilt-by-Location Hunch

An Arizona principal similarly based a student search on such a "hunch" – and lost. *Matter of Pima County Juvenile Action*, 733 P.2d 316 (Ariz. App. 1987). A playground monitor observed a student at a local high school "hanging out" near some bleachers and took him to the principal's office. The principal testified that he was aware of drug use at the school and that students went to the school bleachers to skip classes, smoke cigarettes, use drugs, and engage in other unacceptable activities. Although the principal had never seen or caught the student with drugs previously, and had never received any specific information regarding the student's use or possession of drugs, he directed the student to empty his pockets. The search turned up a small bag of cocaine.

On appeal, the Court struck down the search and held that it was not based upon reasonable suspicion. The playground monitor had not reported any particular suspicious activity involving the student. The principal had no personal knowledge regarding the student's conduct and had received no specific reports that would have given him reasonable suspicion that the minor's pockets would contain cocaine. The only reason the student was brought into the office was because he was in the bleacher area. Although the

bleacher area was a known location for using drugs, no evidence was presented that the student had ever been observed or reported using or selling drugs. The mere fact that he was in a suspicious area did not create a reasonable suspicion that he was in possession of illegal drugs, according to the court.

Group Searches Not Permitted; Individualized Suspicion Required

In *New Jersey V. T.L.O.*, the Supreme Court refused to decide whether individualized suspicion is an essential element of the "reasonableness standard" for school searches. However, other courts reviewing the issue have decided that school officials have "individualized suspicion" regarding the student about to be searched. This means that school employees should not search a group of children, just because they know that one of them is guilty. "Group searches" generally are not allowed.

This principle is demonstrated by a case that deals with a search conducted by a fifth grade teacher in New York. At the beginning of the school day one student complained to the teacher that he was missing three dollars from his coat pocket. No student had had an opportunity to leave the class, so the teacher first searched all the students' coats for the money. The students were then asked to empty their pockets and remove their shoes. Still failing to discover the missing money, the girls were taken to the girls' bathroom and the boys to the boys' bathroom, where each were ordered to strip to their underwear. Afterwards, the students were then returned to their classroom, where a search was conducted of their desk and books. The missing money was never located.

The students' parents sued the school district. The Court agreed that the search violated the prohibition of the Fourth Amendment against unreasonable searches. While there was reasonable suspicion that someone in the class had possession of the stolen money, there were no facts which led the school employees to have a particularized suspicion as to which students might posses the money. In ruling against the school district and its employees, the court concluded that there was no reasonable suspicion to believe that each student searched possessed contraband and/or evidence of a crime. *Bellnier v. Lund*, 438 F.Supp. 47 (N.D. N.Y. 1977). Until the matter is finally decided by the Supreme Court, school officials should assume that individualized suspicion is a necessary element for a reasonable search under the Fourth Amendment.

Articulable Facts Are Required

All these cases stand for a single premise. An administrator or teacher must be able to articulate facts which support their conclusion that they have reasonable cause or particularized suspicion to believe that an individual student has in his possession some item that is subject to seizure and disciplinary sanction. Hunches are not enough. The best types of evidence are observations by school employees and reliable tips by other students. The following cases demonstrate situations where courts have upheld searches which were found to have been properly based upon reasonable cause.

The Two-Way Mirror Nab

Direct observation by school officials usually is strong evidence supporting a student search. In one case, a school district with a history of drug problems installed two way mirrors in the boys' restroom. A school employee observed a tenth grade student buying marijuana in the restroom. The student was taken to the principal's office, where he turned the marijuana over to the principal.

The student's parents sued the school, alleging that the search violated their child's constitutional rights. The Court disagreed, ruling that the principal had reasonable cause to believe that the student had marijuana on this person. The search was based on an observation by a school employee. It gave rise to a reasonable belief that the student had bought the marijuana and had it on his person, as had been observed through the mirror. *Stern v. New Haven Community Schools*, 529 F.Supp. 31 (E.D. Mich. 1981).

The Case of the Surveillance Stake-Out

Reasonable suspicion was demonstrated in another case in which a student search was based upon direct observation by school employees and corroborating statements from other students. An Ohio high school had been plagued by drug problems to the extent that the school administration placed five employees in "concealed surveillance positions" overlooking a designated smoking area in a parking lot adjacent to the high school. The administrators observed a number of high school students passing and smoking marijuana joints and exchanging money and plastic bags which appeared to contain marijuana cigarettes. They identified one student, David Tarter, smoking a marijuana joint and exchanging a plastic bag and money with another student, Michael Cosner. They then "raided" the area, retrieving a marijuana cigarette which Cosner threw down as the administrators approached. On questioning, Cosner admitted he had purchased the marijuana cigarette from David Tarter. He then identified David Tarter's picture in the school year book.

The principal confronted Tarter. He told Tarter that the exchange had been observed and that Cosner had confessed, implicating Tarter as the seller of the marijuana. The principal testified that he smelled the odor of marijuana on Tarter's breath.Based on these articulable facts, the administration then asked Tarter to show them the contents of his pockets and boots. According to the Court, the administration's decision to undertake the search of David Tarter to determine whether in fact he had concealed marijuana on his person was reasonable in the context of his Fourth Amendment rights. *Tarter v. Raybuck,* 742 F.2d 977 (6th Cir. 1984).

The Case of the Stool Pigeon

Reliable student tips can also give school officials the requisite reasonable suspicion to conduct a search. If reasonable suspicion exists, a search for alcohol - which turns up drugs instead - will nevertheless be upheld. A West Virginia high school principal noticed the smell of alcohol on the breath of a student one morning at school. Upon questioning, the student admitted that he had drunk beer at another student's house on the way to school that morning. Suspecting that the other student may have brought some type of alcoholic beverage into the school, the assistant principal directed two teachers to search the other student's locker. They opened the locker with a master key and searched a jacket in the locker, finding a cigarette rolling mechanism, cigarette papers, and a plastic box containing seven marijuana cigarettes.

The student in whose locker they found the marijuana challenged the search, claiming that it was illegal. Applying the first part of the *New Jersey v. T.L.O.* test, the court concluded that the principal had reasonable grounds to suspect that a search of the student's locker would reveal the presence of an alcoholic beverage brought to school in violation of the rules of the school. That suspicion was based upon information from the first student that he had drunk beer at the other student's house. Because the first student smelled of alcohol, the principal believed that the students had brought alcohol to school. The court observed that while such evidence would not constitute the "probable cause" required of police, it was consistent with the "reasonable suspicion" standard required of school officials. *State v. Joseph T.*, 336 S.E.2d 728 (W. Va. App. 1985).

The Party Popper Caper

Other cases support similar action based on reliable student tips. For example, a Kentucky high school was plagued with a sudden rash of small "party popper" fireworks being thrown and exploded during class, disrupting the school. Several students caught throwing the poppers were sent to the

Dean's office where they implicated Sheila Bahr as the person who had brought the poppers to school and distributed them to her friends. The Court held that these corroborating tips constituted reasonable suspicion to justify a search of Sheila Bahr's purse. *Bahr v. Jenkins*, 539 F.Supp. 483 (E.D. Ky. 1982).

The Case of the Parent Tip

In another case, an anonymous parent called the dean of students at a Illinois high school complaining that her daughter was buying marijuana cigarettes from a student, James Lafollette. The caller identified specifically that Lafollette kept the marijuana in a Marlboro box in his school locker, and further informed the dean that the box was in Lafollette's locker that day. On searching the locker, the marijuana was found in the Marlboro box.

The parent called back two hours later, informing the dean that her daughter had also purchased marijuana from another student, Michael Martens. She told the dean that Martens kept drug paraphernalia in the lining of his coat and that he had the paraphernalia in his possession that day. Martens was called to the office for questioning. Marten emptied his coat pockets, producing a pipe containing marijuana residue.

Applying the *New Jersey v. T.L.O.* "reasonable cause" analysis, the Court upheld the search, reasoning that (1) because the high school was facing a substantial drug problem, a tip that one of its students had drug paraphernalia was not inherently implausible; (2) because the tip came from a member of the public rather than from the criminal milieu, as is typical of police informers, it was presumptively somewhat more credible; (3) because the first tip had accurately indicated another student possessing marijuana, there was substantial evidence indicating the second tip was accurate; and (4) the tip was not a blanket allegation, but rather outlined Marten's role as drug distributor, described where he kept his drug paraphernalia, and indicated that he had the paraphernalia in his possession that day. According to the Court, the "detailed nature" of the tip weighed in favor of its accuracy. *Martens v. District No. 220 Bd. of Educ.*, 620 F.Supp. 29 (D.C. Ill. 1985).

SECOND TEST:
Is the Scope of the Search Reasonable?

The second part of the *New Jersey v. T.L.O.* test is to determine the extent to which the scope of the search is reasonably related to the circumstances that justified the search in the first place. This is a difficult judgment call for any administrator or teacher. The issue boils down to the question, "How far is too far?"

In *New Jersey v. T.L.O.*, the Court upheld a search that initially sought a pack of cigarettes, but which was extended in scope to a search of the entire purse for evidence of drug dealing. According to the Court, the extension of the scope of the search was justified: the discovery of marijuana cigarette papers established reasonable suspicion to believe that an extended search would reveal evidence that the student was engaged in illicit drug use or dealing.

Alcohol Search Extended to Plastic Box Containing Marijuana Cigarettes

The "extension of the scope of the search" principle was applied in the *State v. Joseph T.* case discussed above, in which the principal initially opened the locker searching for alcohol, but extended the scope of his search to look in a small box in a jacket in the locker. In that case, the court held that the principal had reasonable suspicion to open the student's locker based on his having caught another student at school smelling of alcohol, who confessed to having consumed alcohol at the other student's home on the way to school. The administrator opened the locker looking for alcoholic beverages but extended his search to the pockets of a jacket in the locker. In the jacket, he discovered a small plastic box containing seven marijuana cigarettes. *State v. Joseph T.*, 336 S.E.2d 728 (W.Va. App. 1985).

In applying the second part of the test, the *State v. Joseph T.* court concluded that the extent of the search conducted by the administrator was within permissible limits. The principal's discovery of pipes and cigarette rolling papers in the student's jacket gave him reasonable suspicion to extend the scope of his search to a small plastic box in the locker, which was discovered to contain marijuana cigarettes. According to the Court, "the discovery of suspected marijuana in the locker was 'reasonably related' to the search for alcoholic beverages."

Scope of Search Can Extend Too Far

Sometimes, school officials extend the scope of a search beyond permissible limits. In one unusual case, a school district conducted a search of a student based upon a drug-sniffing dog's "alerting" to her. Initially, only the student's outer garments were searched. However, when no evidence of contraband was discovered, the student was forced to strip and be searched. The Court ruled that the scope of the search had been unreasonable and awarded punitive damages against the school officials. *Doe v. Renfrow,* 475 F.Supp. 1012 (N.D. Ind. 1979), 631 F.2d 91, 635 F.2d 582 (7th Cir. 1980), *cert den.*, 101 F.2d 3015 (1981).

Although that case was issued prior to the *New Jersey v. T.L.O.* ruling, it is illustrative that the more intrusive a search becomes, the more likely it is to violate the Supreme Court's requirement that the scope of the search must be reasonably related to the circumstances that justified the interference in the first place.

Is a Student's Consent Required Prior to Search?

Most school employees "request" that a student empty his pockets, unlock his car, or open his locker, believing that a student who "consents" to a search has waived any right to complain that the search was illegally conducted. While it is true that an adult who gives knowing, non-coerced consent waives his right to demand, for example, that police obtain a search warrant prior to entering his home, the same principle does not necessarily apply to students. Most courts question whether in a school setting such consent by a minor is valid.

Student Consent May Not Be Valid

School district employees in East Texas found marijuana cigarette "roaches" in a student's car for which they had "asked" permission to search. Judge William Wayne Justice struck down the search, concluding that the student did not freely and voluntarily consent to have his car searched. According to Judge Justice's reasoning:

> [The] targets of the search were children with limited experience in a threatening situation. Insubordination is a disciplinary offense under school rules. Accustomed to receiving orders and obeying instructions from school officials, they were incapable of exercising unconstrained free will when asked to empty their pockets and open their vehicles to be searched.

Even though these were high school students, the Court held that the consent was given in a "coercive atmosphere." Coercion, either express or implied, vitiates consent. *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980).

Other cases support Judge Justice's reasoning. One of the issues in the *Bilbrey v. Brown* case discussed above (regarding the bubblegum hunch) was whether the two students had consented to be searched after the bus driver saw them exchanging something. The Ninth Circuit Court of Appeals expressed real doubt as to the claimed "consent" of the two fifth grade students to a search. The Court stated in a footnote that, "There remains a serious question of validity of the claimed uncounseled waiver by these children of their rights against a search without probable cause."

Similarly, in a Florida case, the "voluntary" nature of a student's consent was questioned. In that case, a teacher's aide patrolling a high school parking lot looked into a student's car and saw a "bong." Bongs are prohibited drug paraphernalia in Florida. Upon being "asked" if school employees could search his car, the student turned over his car keys. The bong was removed from the car - as was a package of Marlboro cigarettes, since possession of cigarettes was prohibited by school regulations. When opened, the package of cigarettes was found to contain marijuana cigarettes.

Even though the "consent" of the student was in doubt, the search was upheld on the ground that the school officials had cause for reasonable suspicion, upon seeing the water pipe, to believe that school regulations had been violated. The search was upheld not because of consent, but because of the existence of reasonable cause. Possession of a water pipe on campus was prohibited by school regulations, and the dean was legally authorized to enter the car and seize the bong. *State v. D.T.W.*, 425 So.2d 1383 (Fl. App. 1983).

Rely on Reasonable Suspicion To Justify Search: 'Consent' is Just the Icing on the Cake

School administrators and teachers should continue to request students to consent to valid searches. However, a school official should not request a student to "consent" to a search which is not justified at its inception. If a school official does not possess reasonable grounds to conduct a search, a student's "consent" will not protect the school official or cure any constitutional defects in the search.

Many school officials confuse "consent" with "reasonable suspicion," believing that if the student does not "consent" to a search, a locker may not be opened or a purse examined. This is an unnecessarily restricted reading of the law. While no student should be physically manhandled or have his person

forcibly searched, articles such as lockers, books, coats and bookbags, do not enjoy a similarly high expectation of privacy. Such articles are surrounded by a lower expectation of privacy. Each search must be handled on an individualized, case-by-case basis.

In most of the cases discussed above, the students did not willingly consent to have their purses, jackets, cars or lockers searched. The principal searched those places without their consent. But such searches are permissible, as long as reasonable suspicion to be believe is established, as discussed above.

However, schools have several alternatives to forcing a student to consent to a search. The simplest and most common practice is to call the student's parents. Most concerned parents will assist the school in dealing with their child and producing the illegal item, if any.

Similarly, if the school is faced with conduct indicating a serious criminal offense, there is nothing that prohibits the district from calling the police. Of course, school employees should not use the threat of calling the police in an attempt to coerce a student to consent to an illegal search which is not based on reasonable suspicion.

If the police are called, the officer will have to determine whether a search is justified and he will have to obtain a search warrant according to their criminal law procedures. A police officer is required to show probable cause to the magistrate prior to a search warrant being issued.

When the police are called in, the search is removed from the hands of the school district. School employees should not participate further in any attempted search of the student. From that point on, the search becomes a criminal matter and is out of the district's jurisdiction.

The advisability of turning such searches over to the police was illustrated in a recent Fifth Circuit case, which dealt with a search of a student's vehicle. The student and her father refused to consent to the search of the student's vehicle, which had been "alerted to" by a drug sniffing dog operated by a company that contracted to provide such services to the school. The principal called a police officer, who properly obtained a search warrant and searched the vehicle. The father sued both the school and the police, arguing that the search was illegal. The Fifth Circuit held that the policeman had met all probable cause/search warrant requirements to conduct a police search. The court further held that the District had no responsibility for the search conducted by the police:

> When the [student and her father] refused to consent to a search of their car, the school defendants turned the matter completely over to Officer Stevens who conducted his own independent investigation. The search that followed was not the result of state action on the part of the school defendants because none of the defendants was responsible for Officer Stevens' decision to seek a warrant, or for the manner in which he prepared his affidavit. There is no evidence on the record to indicate that...a custom or preconceived plan existed between the police and the school district to conduct automobile searches on less than probable cause where the police were involved.
> *Jennings v. Joshua ISD*, 877 F.2d 313 (5th Cir. 1989).

Many student searches involve the search of automobiles parked on the school parking lot. Some school district security personnel have metal "jimmies" that insert in the windows and open car locks with no damage to the vehicle. Such an entry into a vehicle, if based upon valid reasonable suspicion, may seem to be not substantially different from entering a school locker through the use of a master key. However, a higher privacy interest exists in an automobile than a school locker, and school employees are generally best advised not to force entry without consent. In addition, there is the danger of damage to the vehicle caused by forcing entry. Finally, because the students are minors, the title to the vehicles generally is in the parents' names. As will be discussed below, districts should advise students and their parents that vehicles parked on school property may be subject to search at any time based upon reasonable cause. However, for the maximum protection of school staff, if students or their parents refuse to consent to a vehicle search, as shown by the *Joshua ISD* case discussed above, turning the matter over to the police will absolve the staff of any potential liability arising out of the police search.

A final alternative exists. In two of the cases discussed above, no search was made because the students refused to comply with the search request and the school employees did not physically force them to submit. Thus, in *Bahr v. Jenkins*, the student did not allow a search of her purse for party poppers; and in *Tartar v. Raybuck*, the student did not allow a search inside his jeans for baggies in his underwear. Rather than force the students, the administration in each case assessed a penalty based on the circumstantial evidence establishing the students' possession of prohibited items. In the *Tarter v. Raybuck* case, school officials suspended Tarter for 10 days for possession of marijuana, based on the observations of the surveillance teams, the confessions of the other student, and the odor of marijuana on his breath.

Searches of Particular Locations

Court cases have reviewed the seemingly myriad set of places and things that have been sought in school searches. Briefly summarized, the following guidelines govern searches of the usual items:

Lockers

Recent cases indicate that the same reasonable suspicion standard is required for student locker searches as for other types of student searches. While the Supreme Court in *New Jersey v. T.L.O.* specifically declined to address the issue of searches of student lockers, other courts have required some showing of reasonable suspicion prior to searching a locker for a particular item. *In re W.*, 105 Cal. Rptr. 775 (Cal. App. 1973) (locker searched based on tip of another student: locker contained sack of marijuana); *In re Donaldson*, 75 Cal. Rptr. 220 (Cal. App. 1969) (locker search based upon information that student had been selling speed: locker contained marijuana); *Horton v. Goose Creek ISD*, 690 F.2d 470 (5th Cir. 1982), *reh'g den.*, 693 F.2d 524 (5th Cir. 1982), cert den., 103 S.Ct. 3536 (1983)(locker searched based on a trained sniffer dog's alert, must meet reasonable suspicion requirement); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981)(locker search met reasonable cause requirement).

In general, school administrators and teachers must establish reasonable cause to search prior to opening individual lockers. However, in an emergency, such as a bomb threat, when there is immediate threat to life and safety, sweep searches of lockers may be conducted. Similarly, with proper warnings to minimize expectations of privacy, schools may be able to conduct locker inspections on some pre-announced basis. One common example is the rule that the last Friday of every month is library book-check day. Students are told to remove any items from their lockers they do not want to be viewed, because after school on that day all lockers will be opened to check for lost books. Such a pre-announced sweep search should not violate constitutional principles.

By policy, school districts should lessen the expectation of privacy that students can claim in their lockers. Students should be informed that lockers are the property of the school and may be subject to search, as necessary, based upon reasonable cause.

Students should also be notified that they will be held personally accountable for items in their lockers. Burdens of proof can arise where numerous students share lockers or where lockers are unlocked. Such practices can create a fact question whether contraband was "planted" or whether it

belongs to another student sharing the locker. Policies should clearly specify that the lockers are under the control of the students to whom they are assigned; other students should not be permitted to share assigned lockers. Locks, preferably belonging to the school and assigned to the student, should be kept on all lockers.

Automobiles

The same general rules apply to student automobiles. Students should be notified by policy and regulation that all vehicles parked on student property are subject to search, as necessary, based on reasonable cause. Prohibited objects in plain view visible through the windows of an automobile can establish reasonable cause to open and seize the prohibited item. Additionally, as is discussed below, use of drug-sniffing dogs can similarly establish reasonable cause to open and search automobiles. Of course, student tips or other reliable information similarly can establish reasonable cause to search vehicles. No property damage should be done to the automobile in opening it. District policy should be followed in opening a vehicle or calling a parent.

Student Possessions

Searches of a student's possessions will be governed by the reasonable suspicion standard enunciated in *New Jersey v. T.L.O.* The higher a student's expectation of privacy in an item, the greater the level of certainty required. A student should have relatively low expectations of privacy regarding lockers. Courts similarly have not put excessive expectations of privacy over purses, pockets of outer garments, and the contents of pockets. "Pat down" searches are graded at a level of intrusion between an "empty-the-pockets" search and a strip search. In each case, a teacher or administrator would need to have the requisite reasonable suspicion articulated before asking for a search of those items.

In contrast, courts strictly scrutinize any practice where students are requested to strip to their undergarments or to submit to body cavity searches. Such highly intrusive searches generally would require a standard approaching the criminal probable cause standard. Any such search by school officials carries a high degree of risk. Applying the second part of the *New Jersey v. T.L.O.* test, for a search to extend its scope to such an extent, the school officials would have to suspect the student to be guilty of possessing an item whose possession constitutes a serious criminal offense or threat to other students. School districts are generally best advised to leave strip searches to police authorities.

Police Involvement

In *New Jersey v. T.L.O.*, the U.S. Supreme Court recognized that the school setting "requires some easing of the restrictions to which searches by public authorities are ordinarily subject." The Court ruled that school districts do not need to obtain a search warrant, nor to meet the higher "probable cause" standard required of police.

Because school districts are given these expanded and more lenient powers to search, they must not abuse them. Local police cannot come to a school and conduct a search relying on the school's *New Jersey v. T.L.O.* standards. If police come to a school and request to search a student, they will be required by the courts to have a warrant or to be within one of the exceptions to the search warrant requirement. Similarly, if school officials search at the request of the police, courts reviewing the search generally will exclude any evidence not obtained through the more stringent police requirement standards.

However there are circumstances when police involvement in student searches does not have to meet the probable cause/search warrant standard. One circumstance permitting involvement is when the police provide information which motivates school officials to undertake a search. As long as the police do not request, or in any way participate in, a search or interrogation of the student, the search will probably be upheld under the school's reasonable suspicion standard. For example, one court has held that a search conducted by a school principal after receiving a telephone call from the police chief reporting a student's possible use of drugs in school did not amount to a "joint action" with police officers. The search was upheld on the reasonable suspicion school standard, even though the contraband seized in the search was subsequently used in the criminal prosecution of the student. *State v. McKinnon*, 558 P.2d 781 (Wash. 1977).

Another circumstance permitting police involvement is where police may have been invited to participate in a limited purpose (i.e.) to identify whether or not a seized substance is a prohibited drug), but the police do not participate in the search and school officials are not acting as police agents. Under this circumstance, a university's search was upheld where school officials conducted a search of a library carrell in an attempt to identify an objectionable odor emanating from a briefcase which turned out to be full of plastic baggies of a marijuana-like substance. Suspecting the baggies to be marijuana, the school officials consulted with a police expert on narcotics to attempt to identify the contents of the briefcase. The California Supreme Court concluded that:

> In their effort to identify the contents of defendant's briefcase, finally, it was reasonable for the university officials to secure professional advice by enlisting the aid of campus and local police. A single consultation by such officials with a police expert on narcotics falls far short, for example, of a general police-instigated exploratory search of student housing or belongings in the hope of turning up contraband.
> *People v. Lanthier*, 488 P.2d 625 (Cal. 1971).

The reasonableness of a search conducted on school property by police officers assigned by the police department as school security guards must be tested by the standard of probable cause.At least one court has held that school searches by police officers who serve as school security guards and who perform no educational function must meet the police standard of probable cause. *Walters v. United States*, 311 A.2d 835 (D.C. App. 1973).

However, when a police officer, assigned as a non-uniformed "school liaison officer" merely acts in conjunction with a school official in conducting a student search, the prevailing view is that the probable cause standard does not apply. Rather, the reasonableness test applicable to searches by school officials is implemented. This lower standard usually assumes that a school security guard has only limited involvement. Thus, when a school liaison police officer participated in a pat-down search of a student charged with stealing, after school officials had already questioned the student, searched her purse, and discovered incriminating evidence, the Eighth Circuit Court of Appeals held that the subsequent police officer pat-down did not mean that the other aspects of the search by school employees had to meet police probable cause standards. *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987). That court decision remains the highest court to yet rule on the issue. No doubt more cases will follow as districts continue implement police liaison programs with the schools.

Courts generally apply the exclusionary rule to items obtained in an illegal search. Under that doctrine, if a search is illegally conducted, any evidence found is excluded - even though an illegal substance is found. Neither the police nor the district attorney is able to refer to illegally seized evidence in any criminal trial. That excluded evidence is referred to by lawyers as "the fruit of the poisonous tree."

The same exclusionary rule has been applied by courts in criminal or juvenile cases to evidence seized in school searches which were not conducted in accordance with constitutional principles. While the U.S. Supreme Court specifically declined to determine whether the exclusionary rule applied to the

fruits of unlawful searches conducted by school authorities, Texas courts have assumed that the exclusionary rule applies in criminal or delinquency cases.

Evidence obtained in school searches is admissible in subsequent criminal or delinquency proceedings in Texas. However, if used for criminal prosecution, the "chain of custody" must be insured. Seized contraband should be labeled and a single administrator should be responsible for their custody in a secure place until they are turned over to the police. See, *Irby v. State*, 751 S.W.2d 670 (Tex.App. - Eastland 1988) (student convicted for possession of marijuana seized in school search by principal); *Ranniger v. State*, 460 S.W.2d 181 (Tex. Civ. App. —Beaumont 1970) (school search produced 37 tablets of LSD: student convicted of possession); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. — Austin 1970) (search based on student tip produced marijuana cigarettes: student held to be a delinquent child and committed to the Texas Youth Council).

In summary, if a school district, in a normal disciplinary school setting, lawfully conducts a search based upon reasonable cause, and if the police are subsequently notified and the prohibited substance is turned over to the police for prosecution, the legality of the search, under the school search standards set forth in *New Jersey v. T.L.O.*, generally is upheld under the reasonable cause standard. However, if the school search is at the request of (or as a subterfuge for) the police, the search will generally be struck down and the evidence excluded on the grounds that the search did not meet the constitutional standard required of police searches.

Sniffer Dogs

Many school districts now contract with private companies that train "drug-sniffer dogs" to sniff out drugs and other prohibited substances present on school campuses. Such sniffer dogs have been used by customs officials to sniff baggage and other containers being imported into the United States. The use of the dogs, however, on school campuses is somewhat proscribed by recent federal court decisions.

The lead case is *Horton v. Goose Creek ISD*, 690 F.2d 470 (5th Cir. 1982), *reh'g den.* 693, F.2d 524 (5th Cir. 1982), *cert. den.* 103 S.Ct. 3536 (1983). In that case, the Fifth Circuit reviewed a school district's use of sniffer dogs to sniff student lockers, student automobiles, and students in the classroom. The Court approved the use of sniffer dogs to sniff around automobiles and lockers. The courts had previously held that sniffing by dogs of luggage in an airport, for example, was not a search because the passengers' reasonable expectation of privacy does not extend to the airspace surrounding that luggage. The passengers had released their bags to the custody of the airlines and

had relinquished - at least temporarily - all control over them.

That same rationale was applied to dogs sniffing student lockers in school hallways and automobiles parked on school parking lots. Such sniffs occur while the objects are unattended and positioned in public view. Thus, according to the Fifth Circuit, sniffs of lockers and cars do not constitute a search. Because it is not conducting a search, a school district does not need to establish reasonable suspicion prior to having a dog sniff a locker or car.

If the dogs have been trained so that they are reasonably reliable in indicating the presence or recent presence of contraband, a dog's "alerting" to a locker or automobile may provide the necessary reasonable suspicion to believe that the locker or car contains a prohibited substance. Once reasonable suspicion is established in this manner, the locker or automobile may be searched. In effect, the dog's alerting operates in the same way as a "tip": a reliable tip can constitute reasonable suspicion to conduct the search.

A different rule applies to dogs sniffing students. Students have a high expectation of privacy with respect to their bodies. The Fourth Amendment applies "with its fullest vigor against any intrusion on the human body." *Horton v. Goose Creek ISD*. Intensive smelling of people, even if done by dogs, is indecent and demeaning, according to the Fifth Circuit, and most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. Intentional close-proximity sniffing of the person is offensive, whether the sniffer be canine or human. In addition, self-conscious adolescents might experience severe embarrassment, according to the court, to a dog sniffing around them, putting its nose on them, and scratching and manifesting other signs of excitement in the case of an "alert."

For all of those reasons, the Fifth Circuit held that dogs sniffing students' persons is a search, and is protected by Fourth Amendment constitutional principles. Thus, a school district would need to have established reasonable suspicion prior to allowing a dog to sniff a student's body. In practice, the dog companies do not use the sniffer dogs to sniff students: if reasonable cause exists to have a dog sniff a student, adequate cause already exists anyway to search the student, and the dog sniff is unnecessary.

Similarly, sniffer dogs are not used to sniff groups of students. Such a group search would constitute an illegal search. Individualized reasonable suspicion should be identified before allowing a dog to sniff any student. As in *Bellnier v. Lund* (where the teacher searched the entire fifth-grade class for a missing three dollars), allowing dogs to sniff-search entire groups of students, without individualized suspicion, would violate constitutional principles and expose participating employees to liability.

Urinalysis and Drug Testing

It is well-established that the involuntary taking and analyzing of a urine sample constitutes a search. When a school district initiates a policy of student drug tests, it implicates students' constitutional right to be free from unreasonable governmental searches. The "personal intrusiveness" of drug tests compels its characterization as a search. Because it is a search, any examination of drug testing in a school setting requires compliance with constitutional principles mandated by the Fourth Amendment. Prior to requiring any student to submit to an involuntary search, the school district should establish individualized reasonable suspicion to believe that a student has in his or her possession some prohibited item or substance.

Courts Have Struck Down Involuntary Urinalysis Programs

Several cases examine school district attempts to require students to submit to urinalysis testing. The earliest is *Anable v. Ford*, 663 F.Supp. 149 (W.D. Ark. 1985), modifying 653 F.Supp. 22 (W.D. Ark. 1985). In that case, an Arkansas school district required students to submit to urinalysis testing to "prove" their innocence in the face of a charge that they had used marijuana at school. Female students were forced to urinate into a sample bottle in the middle of the girls' bathroom, in the presence of school employee witnesses.

The court held that the urinalysis constituted an "excessively intrusive" search. In addition, it was ineffective to determine guilt or innocence, in that it could not "prove" that the students used drugs at school on the day charged. The EMIT urinalysis test can only give an indication whether certain substances were ingested within a period of several days or weeks.

A New Jersey court struck down attempts by a school district to require mandatory drug tests of all students as part of annual student physicals. The school district argued that the annual drug tests were requested only for medical reasons. Instead, the Court concluded, the evidence showed that the program was "an attempt to control student discipline under the guise of a medical procedure." *Odenheim v. Carlstadt-East Rutherford Regional School District,* 510 A.2d 709 (N.J. Super.Ch. 1985). According to the Court, because mandatory urinalysis constitutes a search, it must be predicated on a showing of individualized reasonable cause. Because all students were required to submit to the urinalysis, there was no requisite reasonable cause shown to justify the required urinalyses.

Only one reported case approves an type of student drug-testing program, and it deals only with varsity athletes who were required to consent to

random urinalysis as a condition for participation in extracurricular sports. An Indiana high school required all varsity athletes to submit to random urinalysis drug-testing before being eligible for interscholastic sports. The method of collecting the specimens protected the students' privacy rights and further allowed for confidentiality of the students' identities.

The court viewed the testing program for athletes in extracurricular activities in a different light than it would a testing program for students in the school's regular education programs. While holding that the random drug-testing was a search, the court concluded that the consent requirement was reasonable because athletes did not have a protectible property or liberty interest in participating in varsity sports.

The court reasoned that interscholastic athletes voluntarily take on responsibilities not imposed on other students. They commit themselves to a system of discipline and training, and agree to comply with rules which generally specifically prohibit the use of alcohol, tobacco, and drugs. These prohibitions are generally understood to extend beyond the school day, inasmuch as the purpose of the prohibitions is to protect the athlete's health and safety, as well as to enhance his quality of performance in the athletic arena. Additionally, the Court considered that athletes may be expected to be involved in extreme situations of stress and intensity, both physical and mental. Rapid movement, physical contact, and intense physical challenge inherent in school athletics involve those students in situations of risks in terms of health and safety.

The Court concluded that school authorities acted within their discretion in singling out varsity student athletes for the proposed drug program, especially inasmuch as participation in interscholastic competition is not a constitutionally-protected right. *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988).

The *Schaill* case is highly controversial and has not yet been followed by other courts. A Texas school district, East Chambers Independent School District, instituted a drug-testing program similar to that in the Schaill case, except that the District mandated random urinalysis for participants in all school extracurricular activities. In that case, a student who was barred from participating in Future Farmers of America activities until he submitted a urine sample sued the District, requesting the court to permanently enjoin the District's urinalysis program. The court agreed with the student that the District's program was unconstitutional. Citing the leading *New Jersey v. T.L.O.* decision by the Supreme Court, the court set forth the following rules of law:

> The Constitution . . . specifies that under ordinary circumstances a search of a school child must be based on individualized suspicion that the search will discover evidence of wrongdoing. The ECCCISD school officials admit that their testing program is not based on individualized suspicion. In order for the drug testing program to be legal, then, it must have been prompted by circumstances other than ordinary. Further, even if such "extraordinary" circumstances do exist, *T.L.O.* still mandates that the students' Fourth Amendment rights may not be diluted any more than is necessary to preserve order in the schools.
>
> A special interest required to justify the urinalysis program could exist in the ECCCISD if it were shown that participants in extra-curricular activities are much more likely to use drugs than non-participants, or that drug use by participants interfered with the school's educational mission much more seriously than does drug use by non-particpants. Neither assertion is supported by the evidence.
>
> *Brooks v. East Chamber Consolidated Independent School District,* 730 F. Supp. 759 (S.D.Tex. 1989) at p. 764.

The court distinguished the *Schaill v. Tippecanoe County School Corp.* case discussed above by stating that, "This court cannot accept Tippecanoe as decisive on the ECCCISD facts because recent Supreme Court precedent would effect a different outcome in Tippecanoe if decided today." Based on the Supreme Court's analysis in *Skinner v. Railway Labor Executives' Ass'n.*, 109 S.Ct. 1402 (1989) and *National Treasury Employees Union v. Von Raab,* 109 S.Ct. 1384 (1989), the court concluded that the school district's interest in testing its student's urine was not the kind of "compelling" interest related to firearm safety or potential blackmail of customs agents present in the *Skinner* and *Von Raab* cases. The court concluded that of the two federal courts of appeal that have examined the issue of student urinalysis programs, "the law of the Seventh Circuit is different from and less protective of student rights than Fifth Circuit law". *Brooks*, at p. 766.

Until the law is settled in this area, school districts generally are advised not to institute mandatory student drug-testing programs. Several school districts, however, have set up model voluntary athlete programs, in which individuals voluntarily consent to random urinalysis that otherwise would not be allowed.

Voluntary Student Programs

For a program to be voluntary, each participating student's own written consent to a random drug-testing program would be required. Such consent should be given voluntarily and knowingly. For students under age 18, the school district should also obtain the consent of the student's parent or guardian. Of course, to be truly voluntary, the program must allow students who had previously consented to withdraw their participation in the testing at any time.

In addition to being completely voluntary, any such program must be carefully implemented. Adequate notice should be given to the students of the program's procedures and the consequences of a positive drug test.

The actual drug test should be conducted in a reasonable and confidential manner. To insure that specimens collected would clearly be identified with the proper student, the school district should establish a "chain of custody" for all specimens.

Retests for students testing positive would be necessary.

The standard EMIT urinalysis test must be confirmed by a second test using an alternate method. The initial EMIT urinalysis test is a "high-positive" test, reporting positive for a number of substances, including some prescription drugs and some substances which are not prohibited substances, including quinine, which may be available in tonic water and other beverages.

A student could not be considered "under the influence" simply due to a positive test. Similarly, testing positive on a drug test is not evidence of "selling, giving, or delivering to another person, or possessing or using" drugs on school property or at school sponsored activities. Any disciplinary sanctions, such as removal to an alternate education program, suspension, expulsion, etc., should require separate evidence of a drug offense on school property. The end result is that drug-testing programs are more prophylactic in nature than they are disciplinary. Testing positive indicates, at best, that the student may be participating in drug activity which may require the intervention of parents or medical assistance.

The Texas Constitution has been interpreted by the Texas Supreme Court to protect governmental employees from mandatory lie detector tests, which protection probably would be applied as well to students required to submit to drug tests without reasonable suspicion. Because drug tests cannot prove that a student is under the influence or is using drugs at school, it generally is useless as a evidentiary tool in discipline hearings. At most, such results could only be used for identifying students in need of drug counseling.

Because it is unlikely that serious drug abusers would voluntarily agree to submit to such testing, most school districts have determined that such programs are not worth the expense, controversy and possible liability involved in such a speculative enterprise. School districts continue to take a "wait and see" attitude toward drug testing.

Breathalyzer Alcohol Tests

In the same *Anable v. Ford* case discussed above, the federal court in Arkansas also examined the use of breathalyzers to test for ingestion of alcohol beverages or for being under the influence of alcohol at school events. In that case, Benson Anable had been drinking the night before out on the riverbank in Arkadelphia, Arkansas with his friends. He drank a beer before coming to school the next morning "to reduce the effect of his hangover". He was confronted by school officials and given the option to submit to a breathalyzer test at the police station or to be expelled. Applying the rule set forth by the U.S. Supreme Court in *New Jersey v. T.L.O.*, the court upheld the use of breathalyzers in certain limited circumstances:

> Certainly *T.L.O.* mandates that there be at least reasonable suspicion that a student has used alcohol while at school or is under the influence of alcohol at school, before a breathalyzer test could be required of a student by school officials. Mere possession of alcohol would not, of itself, indicate that alcohol is present in the blood or breath, and in those cases it would appear that a breathalyzer test could not be mandated over objection of the student.

Anable v. Ford, supra, at page 35. In this case, the student and his mother both freely gave their consent to conduct the breathalyzer test. The court concluded by stating as follows:

> Finally, the court believes that the breathalyzer is not an exceptionally invasive procedure. Taking a student to the police station to blow into a breathalyzer machine is little more invasive in itself than taking a child to a five-and-dime store to blow up a balloon.

Anable v. Ford, supra, at page 36.

Student Searches in Other Extracurricular Activities

The courts are split in determining whether individualized reasonable suspicion is required for searches of students engaged in extracurricular activities. As discussed above in the Schaill case, at least one federal court has approved random drug tests of interscholastic varsity athletes, waiving the requirement of a showing of individualized suspicion or reasonable cause. The *Schaill* court reasoned that, because participation in extracurricular athletics is not a protected property right and because students are not required to participate in extracurricular athletics, such a drug-testing program is truly "voluntary."According to the court, a student is not waiving any protected rights by agreeing to participate in a drug-testing program in order to participate in an extracurricular athletic program - or by choosing not to participate in an extracurricular athletic program. As discussed above, the *Schaill* case has not yet been endorsed by other courts in other jurisdictions.

Since 1985, the leading case on the issue of the applicability of Fourth Amendment search principles to extracurricular activities has been a case involving a Washington high school. As a condition for participation in band concert trips, each band member was required to submit to a pre-departure luggage search by parent chaperones. The practice was initiated after an incident on an earlier trip when two students were caught with liquor in their hotel rooms. Any student refusing to submit to a luggage search was prohibited from participating in the concert trip.

On review, the Washington State Supreme Court ruled that the search did not meet Fourth Amendment principles. According to the court, it made no difference that the extracurricular activity was voluntary. Participation in the concert trip was not a private outing. Instead, it was an authorized school activity in which band members were expected to participate unless they could not financially afford to do so. The court ruled that school officials must have some individualized suspicion to believe that drugs or alcohol would be found in the luggage of each individual student searched. While it is true that, in any sufficiently large group, there is a statistical probability that some student will have contraband in his possession, the Fourth Amendment demands more than a generalized probability. It requires that the suspicion be particularized with respect to each individual searched, according to the Washington State Supreme Court. *Kuehn v. Renton School District No. 403*, 694 P.2d 1078 (Wash. 1985).

In contrast, a different court extended greater rights to school district chaperones on senior trips to exotic places. In that case, a Tennessee high

school class took a non-curricular spring break trip to Hawaii. *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987). The principal, who was one of the chaperones, used a master key on one occasion to enter a female student's room to search for alcoholic beverages and on a second occasion to pursue a male student who was observed jumping onto the room's balcony from an adjoining room. The hotel room was paid for from the student's own funds. In the two entries into the room, at different times the principal searched the female student's bathroom and suitcase, including "personal hygiene items.

The Sixth Circuit distinguished searches in normal school activities, from searches on non-curricular, purely-voluntary school trips where students pay their own way and parents delegate parental authority to chaperones. Rather surprisingly, the federal Sixth Circuit Court of Appeals upheld the principal's search, in this unique instance, based on the doctrine of in loco parentis.

In *New Jersey v. T.L.O.*, the U.S. Supreme Court had stated definitively that the doctrine of *in loco parentis* could not cloak school officials, with the immunities of parents in normal school searches. The doctrine of school searches in loco parentis is not compatible with compulsory school attendance, according to the Supreme Court. In carrying out searches in required school activities, school officials act as agents of the state, and not solely as surrogate parents. As agents of the state, they cannot claim a parent's immunity from the strictures of the Fourth Amendment in normal school searches, according to the U.S. Supreme Court.

However, in *Webb v. McCullough*, the Sixth Circuit Court of Appeals declared that *in loco parentis* retained vitality in certain narrow circumstances. In a search on a non-curricular holiday excursion, the principal searching the student's room was acting both as representative of the state and as a surrogate parent, according to the court.

In *Webb v. McCullough*, the court reasoned that four factors permitted the application of the *in loco parentis* doctrine. (1) The trip did not involve mandated education; it was a purely voluntary undertaking. (2) A greater range of activities occurs during extracurricular activities than occurs during school. Thus, an administrator may require a greater range of intervention than is necessary when a student is within the relatively orderly confines of a school. (3) There are many more ways for a student to be injured or to transgress school rules during a non-curricular school field trip than there are during school hours. Many parents would be reluctant to permit their students to go on field trips if the accompanying school officials' authority to supervise were subject to the same Fourth Amendment Prohibitions as apply to local police forces. (4) The Court reasoned that this was a search of the student's "residence," albeit a temporary one. The student had paid for the hotel room. The Court distinguished that situation from a search on public property in the

course of an ordinary school day.

In summary, the courts' different holdings can be harmonized as follows: Fourth Amendment requirements for reasonable cause and individualized suspicion would apply to searches on band concert trips and other co-curricular and extracurricular activities where students are "expected" to go, as part of participation in some related school activity. However, for "senior trips" and "spring break bashes" that are non-curricular and strictly voluntary, school chaperones may acquire greater in loco parentis search rights, wherein they can claim the immunity of a parent or guardian.

Liability

Constitutional principles are often difficult to understand, much less to apply. However, school officials who participate in illegal searches may expose themselves to potential liability. School administrators and teachers generally enjoy good faith immunity from liability for damages in civil rights lawsuits, insofar as their conduct does not violate established statutory or constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). Because the basic Fourth Amendment rights of students are now well-established, school officials are on notice and must act consistently with constitutional safeguards. The qualified good faith immunity defense may not be available if a lawsuit arises out of an impermissible search that violates constitutional principles of which they should have been aware.

School employees anticipating a student search should take the necessary time to determine that they can articulate the facts which lead them to believe that they have individualized, reasonable suspicion to believe the student they are about to search possesses a seizable item prohibited by state law or school rules. A hunch is insufficient. School administrators should inquire into the reliability of student tips, questioning the informant in detail to determine the reliability of the tip. The administrator should determine the manner in which the informant became aware of the information, his relationship to the accused student, whether the informant has a reputation for veracity, and whether he in fact was in a position to observe what he claimed he saw and heard. Similarly, an administrator or teacher acting on personal observation should carefully articulate what he or she saw, in detail, to establish the reasonable suspicion that a student is in possession of a prohibited substance. Additionally, if the reasonable suspicion is based on the smell of alcohol or drugs on a student's breath or person, erratic behavior, bloodshot eyes, runny nose, or similar behaviors, school employees should carefully note and remember all such characteristics. Any court will review the totality of the circumstances, based on all the facts, to determine whether a challenged search was reasonable and legal.

Conclusion

The U.S. Supreme Court has given school districts a great deal of flexibility in maintaining discipline and conducting necessary searches. Although school districts need not meet police standards of probable cause and search warrants, school administrators and teachers should be careful to insure that student searches meet Fourth Amendment guidelines set for school districts by the U.S. Supreme Court.

Each search must meet the two-part test of *New Jersey v. T.L.O.*: (1) the search must be justified at its inception by reasonable grounds to suspect that the search will turn up evidence that the student has violated or is violating the law or school rules, and (2) the search must be reasonably related in scope to the circumstances that justified the interference in the first place. Failure to comply with these minimal mandated constitutional protections can result in liability for school staff participating in impermissible searches. School employees should have individualized suspicion regarding a student about to be searched: "sweep" searches of groups of students is impermissible. Because student searches involve a protected constitutional right, each should be conducted in a serious manner with full attention to a student's protected rights.

Tips For Conducting a Successful Search

Once you have established reasonable grounds to conduct a search, there are some general guidelines you should follow to protect yourself and ensure that the search is not contested at a later date either by your school board or the courts.

General

1. Always have an adult witness present from the inception of the search until the "evidence" is properly secured. This will strengthen any case brought against the student and protect the searcher from charges of improper conduct.

2. Searches, especially student searches, should be conducted and witnessed by members of the same sex. This will help protect the rights of the student as well as those of the searcher from claims of impropriety.

3. Searches should be conducted in such a way as to cause the least amount of embarrassment to the student. Only the searcher, witness, and student should be present. Never search a student in front of another student.

4. Whenever a search is to take place, the student should be escorted from class to where the search is to take place. Stops along the way (restroom, locker) should be avoided. All personal property including books, jackets, hats, tote bags, and purses should be brought by the student from the classroom to where the search is to be conducted.

Search of a Student

1. Student searches should be conducted in a private area where there will not be interruptions.

2. Have student remove all outer clothing such as a coat, sweater, hat and shoes. Have student remove all objects from pockets. Lay these aside until student is searched.

3. Conduct the search from the side of the student body working from top to bottom on each side.

4. Check middle of back, inside forearms and thighs.

5. Instead of patting material, crush the cloth in articles of clothing. Flat objects may be easily overlooked by just a pat.

6. Don't stop if contraband is found. Continue until all objects have been investigated.

7. Turn attention to items that had been set aside. Items that could conceal contraband should be taken apart or, in the case of books, thumbed through.

8. Remember that the scope of the search must be reasonably related to the circumstances which justified the search.

Search of a Locker

1. A written school policy which states that lockers belong to the school lowers expectations of privacy.

2. Lockers should not be shared by students, since this confuses ownership issues.

3. The student should be present when a locker is searched but not allowed near the locker.

4. Witnesses should arrange themselves so they can see both the locker search and the student's face. Human nature forces many students to stare at areas where contraband is located.

5. Start from the top of the locker, working down. Do not replace items in locker until it is empty.

Search of Automobiles

1. School policy should be established that parking on campus is a privilege not a right.

2. Student should be present at time of search.

3. Any illegal object in plain sight can justify the search.

4. The automobile should not be damaged by the search.

Chain of Custody

1. An individual should be designated in each school to be in charge of possible contraband.

2. Contraband should be placed inside an envelope and sealed with the date, official's name, and circumstances behind the seizure.

3. Seized evidence should be secured in a locked desk, cabinet or vault.

4. Evidence should be turned over to hearing officer or police as soon as possible.

By following these few simple procedures, your chances of success in conducting the search and admitting the seized material as evidence will be greatly increased.

The Authors

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Communities Against Substance Abuse (CASA)

CASA is a federally funded grant program which is part of the services offered through the School of Education at Southwest Texas State University.

The Center for Initiatives in Education in SWT's School of education established the Communities Against Substance Abuse Program in January, 1990. CASA is a comprehensive statewide substance abuse prevention program conducted by the CIE in collaboration with the Texas Education Agency, the Texas Commission on Drug and Alcohol Abuse, the Southwest Regional Center for Drug Free Schools and Communities, and the Texans' War on Drugs. CASA augments school-based prevention efforts by facilitating increased local community support and initiatives attacking substance abuse. CASA provides training and technical assistance to community based anti-drug teams of educators and community members and conducts research on substance abuse and develops publications concerning effective prevention programs and services. Information regarding successful techniques in substance abuse prevention and education are widely disseminated.

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